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No. 95-258

In the Supreme Court of the United States

OCTOBER TERM, 1995

JAMES E. JONES, JR., ET AL., PETITIONERS

v.

SHANNON RICHEY FAULKNER
AND
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

DEVAL L. PATRICK
Assistant Attorney General

JESSICA DUNSAY SILVER
THOMAS E. CHANDLER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTIONS PRESENTED

1. Whether respondents' objections to the constitutional adequacy of petitioners' proposed remedy for petitioners' violation of the Equal Protection Clause divested the lower courts of jurisdiction to authorize a remedy of the type petitioners proposed.

2. Whether petitioners are relieved of any obligation to remedy the unconstitutional sex-based exclusion of women from The Citadel because of an alleged lack of demand by women for a parallel all-female program when the lower courts found that there is no such lack of demand.

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OPINIONS BELOW

The opinion of the court of appeals (Faulkner App. 1a-32a) is reported at 51 F.3d 440.[1] The opinion of the district court (Faulkner App. 33a-66a) is reported at 858 F. Supp. 552. An earlier opinion of the court of appeals (Faulkner App. 70a-100a) granting respondent Faulkner's motion for a preliminary injunction is

[1] References to "Faulkner App. __" are to page numbers in the appendix of Shannon Richey Faulkner's petition for a writ of certiorari, filed on July 10, 1995. *Faulkner* v. *Jones*, No. 95-31.

reported at 10 F.3d 226. The order of the district court granting Faulkner's motion for a preliminary injunction (Faulkner App. 69a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1995. On June 30, 1995, the Chief Justice granted petitioners an extension of time within which to file a petition for a writ of certiorari to and including August 11, 1995. The petition for a writ of certiorari was filed on August 11, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Citadel has had a males-only admissions policy since its founding in 1842. It is one of 12 public colleges and universities in South Carolina offering four-year degree programs, and it is the only institution in the State that offers a military-style educational program. Members of The Citadel Corps of Cadets[2] are subject to military discipline at all times, and are enrolled in programs of study that qualify graduates for commissions in the active or reserve armed forces. Faulkner App. 37a, 38a, 71a.

In March, 1993, Shannon Richey Faulkner filed suit challenging The Citadel's males-only admissions policy. Faulkner had previously been accepted for admission to The Citadel and its Corps of Cadets, but that acceptance was revoked when the school learned that she was female. Faulkner sought permanent relief ordering her admission and prohibiting petitioners from continuing to exclude women from The

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[2] The Corps of Cadets is the military-style co-curricular component that is the central feature of The Citadel's educational program.

Citadel. On May 28, 1993, Faulkner filed a motion for class certification, which remains pending. In June, 1993, the United States intervened as a plaintiff pursuant to 42 U.S.C. 2000c-6. Faulkner App. 2a, 34a-37a, 71a-72a.

2. In *United States* v. *Commonwealth of Virginia*, 976 F.2d 890 (4th Cir. 1992), cert. denied, 113 S. Ct. 2431 (1993) (*VMI I*)—a case preceding this one and closely similar to it—the court of appeals considered an equal protection challenge to the Commonwealth of Virginia's exclusion of women from the Virginia Military Institute (VMI). The court held that the defendants had failed to justify offering the unique benefits of a VMI-type education to men and not to women, and that VMI's males-only admissions policy thus violated the Equal Protection Clause. *Id.* at 892. The court of appeals "remand[ed] the case to the district court to give to the Commonwealth the responsibility to select a course it chooses, so long as the guarantees of the Fourteenth Amendment are satisfied." *Id.* at 900. The court stated that "the Commonwealth might properly decide to admit women to VMI and adjust the program to implement that choice, or it might establish parallel institutions or parallel programs, or it might abandon state support of VMI, leaving VMI the option to pursue its own policies as a private institution. While it is not ours to determine, there might be other more creative options or combinations." *Ibid.*

On remand, the *VMI* defendants proposed a remedial plan establishing a separate program for women at Mary Baldwin College, called the Virginia Women's Institute for Leadership (VWIL). VWIL would not use VMI's adversative method or pervasive military life; a cooperative confidence-building method

would be employed at VWIL, and military training would be limited to the pre-existing ROTC program. The district court upheld the remedial plan, and the court of appeals affirmed. *United States* v. *Commonwealth of Virginia*, 44 F.3d 1229 (4th Cir. 1995) (*VMI II*), petition for cert. pending, No. 94-1941. Adopting a new, three-part "special intermediate scrutiny test," the court held that Virginia could remedy its constitutional violation by offering women a separate single-gender educational program "substantively comparable" to the VMI program. *Id.* at 1237. The court concluded that VMI and VWIL meet that test because the "missions are similar and the goals are the same" and "[b]oth seek to teach discipline and prepare students for leadership." *Id.* at 1240.[3]

3. Meanwhile, following a trial on the merits, and in light of the court of appeals' decision in *VMI I*, the district court on July 22, 1994, held that The Citadel's males-only admissions policy violates the Equal Protection Clause. Faulkner App. 33a-66a.[4]

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[3] On May 26, 1995, the United States filed a petition for a writ of certiorari challenging the constitutional adequacy of the remedy approved in *VMI II*. *United States* v. *Commonwealth of Virginia*, No. 94-1941. The *VMI* defendants filed a conditional cross-petition seeking review of the court of appeals' initial liability determination in the event the Court grants the United States' petition. *Commonwealth of Virginia* v. *United States*, No. 94-2107. The petition and cross-petition are pending.

[4] The district court had, on August 17, 1993, granted Faulkner's motion for a preliminary injunction permitting her to attend The Citadel as a day student, Faulkner App. 69a, and the court of appeals affirmed that order on November 17, 1993, *id.* at 70a-100a. She continued to be excluded, however, from the Corps of Cadets.

The court ordered Faulkner's immediate admission to The Citadel's Corps of Cadets. *Id.* at 62a-63a. With respect to other qualified women who might desire to attend The Citadel and join the Corps, the court gave petitioners until the start of the 1995-1996 school year to formulate and implement a remedial plan conforming with the Equal Protection Clause. *Id.* at 65a.

4. On April 13, 1995, the court of appeals affirmed the judgment of the district court that The Citadel's males-only admissions policy violates the Equal Protection Clause. Faulkner App. 1a-32a.[5] The court rejected petitioners' argument that the policy of excluding women from The Citadel is gender-neutral. *Id.* at 4a-5a. The court also affirmed the district court's factual findings that there is no absence of demand among women for a single-sex program parallel to The Citadel, and thus rejected petitioners' contention that their failure to offer such a program to women is justified by an absence of demand for it. *Id.* at 8a-9a.[6] The court noted that petitioners conceded at oral argument that there was "no data before [the] court to support a finding of an absence of demand among women at the present time for single-gender education of any type." *Id.* at 9a.

The court of appeals' April 13, 1995, opinion also modified the district court's remedial order. Faulk-

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[5] Judge Hall wrote a concurring opinion. Faulkner App. 18a-20a. Judge Hamilton dissented. *Id.* at 20a-32a.

[6] Faulkner App. 8a (rejecting petitioners' contention that the current absence of "a Citadel for women" results from an absence of adequate demand for such a program because petitioners "ha[d] not offered evidence to establish that absence of demand").

ner App. 18a. Although the court noted that petitioners had already had substantial time to devise a remedy and had failed to do so, it held that the district court should give them "reasonable" additional time beyond the start of the 1995-1996 school year to put their general remedial plan in place. *Id.* at 14a-15a. The court emphasized that the State should have the opportunity in the first instance to devise a remedial plan to bring its higher education system into compliance with the Equal Protection Clause, and, following its *VMI* decisions, identified some of the remedial alternatives it viewed as acceptable:

> If [South Carolina] elects to maintain single-gender education at The Citadel, then it must provide parallel programs for men and women that are substantively comparable. *See VMI II.* Alternatively, the state may adopt a coeducational policy for The Citadel, or it may withdraw state support from The Citadel and permit that institution to continue as a private institution.

Id. at 14a. The court of appeals also modified the district court's order requiring that petitioners immediately admit Faulkner to the Corps, instead ordering her admission only "if the state is unable to accomplish an acceptable alternative plan by August 1995." *Id.* at 18a.[7]

5. On June 5, 1995, petitioners filed a remedial plan in district court in which they proposed the creation

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[7] On July 10, 1995, Faulkner filed a petition for a writ of certiorari in this Court seeking review of that part of the court of appeals' decision permitting petitioners, in accordance with *VMI II*, to remedy their constitutional violation by creating a separate school for women. *Faulkner* v. *Jones*, No. 95-31. That petition is pending.

of a "parallel" program exclusively for women to be called the South Carolina Institute of Leadership for Women (SCIL) at Converse College, a private women's college in Spartanburg, South Carolina. *Faulkner* v. *Jones*, No. 2:93-488-2 (D.S.C. July 24, 1995), slip op. 3.

Respondents requested discovery regarding Converse College and the SCIL plan. On July 24, 1995, the district court held a hearing at which it found that petitioners had deliberately withheld discovery information, had failed to respond properly to discovery requests in violation of the court's rules, and had otherwise slowed the discovery process. *Faulkner* v. *Jones*, *supra*. The court concluded that petitioners' conduct made timely consideration of their remedial proposal impossible, and that admission of Faulkner to the Corps was the only effective remedial alternative for her.

6. Petitioners unsuccessfully applied to the court of appeals, and then to this Court, for a stay of Faulkner's admission to the Corps of Cadets pending their filing of the present petition for a writ of certiorari. They filed the petition on August 11, 1995.

7. Faulkner joined The Citadel Corps of Cadets when The Citadel's 1995-1996 school year began on August 12, 1995. On August 18, 1995, however, she withdrew from The Citadel and the Corps.

8. The district court has set an October 15, 1995, deadline for discovery regarding petitioners' proposed remedy, and a November 6, 1995, date to begin the remedy trial. *Faulkner* v. *Jones*, No. 2:93-488-2 (D.S.C. July 24, 1995), slip op. 12. By motion dated August 31, 1995, Nancy Mellette, a high school senior and resident of South Carolina who wishes to attend The Citadel, moved to intervene as a plaintiff in

this action, and to renew Faulkner's motion for class certification.

ARGUMENT

Petitioners seek certiorari on two grounds, neither of which has merit or presents any issue worthy of this Court's review.[8]

1. Petitioners assert (Pet. 15-22) that the lower courts "exceed[ed] their jurisdiction in this case by reaching the issue of whether the absence of an all-female military program like The Citadel is constitutionally justified." Pet. 13. They contend that, because respondents sought admission of women to The Citadel, and not the creation of a separate school exclusively for women, "there is no 'case or controversy' * * * concerning the State's failure

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[8] The insubstantial nature of petitioners' arguments are underscored by the incorrect premise on which they rest. Petitioners mischaracterize the court of appeals' decision as having held that the males-only admissions policies of VMI and The Citadel are *constitutional*. Petitioners assert, for example, that the court of appeals "concluded that The Citadel's males-only admissions policy satisfies the equal protection standard established by this Court in [*Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718 (1982)]." Pet. 13. See also Pet. 4 (describing *VMI I* as having concluded "that VMI's males-only admission policy is constitutionally justified"); *id.* at 10-11 (omitting mention of liability determination in describing *Faulkner II*); *id.* at 17 (referring to *VMI I* as "concluding that VMI's males-only admission policy was constitutionally justified under the equal protection standard established in *Hogan*"). The court of appeals held, however, that "South Carolina and The Citadel are *in violation of the Equal Protection Clause*." Faulkner App. 9a (emphasis added). If petitioners' assertion were true, there would have been no remedial proceedings in either case.

to establish an all-female military program like The Citadel." Pet. 20.[9]

Petitioners have not presented a jurisdictional issue. The fact that the United States and Faulkner have both consistently argued for coeducation at The Citadel as the only constitutionally adequate remedy in this case has no effect on their standing or on any other aspect of the lower courts' jurisdiction over this case. Indeed, petitioners concede (Pet. 20) that the United States has standing to challenge The Citadel's policy of excluding women.[10] It is undisputed that qualified women who wish to attend The Citadel are precluded from doing so solely because they are women. Such sex-based exclusion constitutes an "actual or imminent" injury, *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992), that is obviously "fairly traceable" to The Citadel's unconstitutional policy, *Allen* v. *Wright*, 468 U.S. 737, 751 (1984).[11] See also 42 U.S.C. 2000c-6(a) (providing that federal district courts "shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section").

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[9] Petitioners acknowledge (Pet. 14 n.4) that they have never raised this argument in the lower courts, either in their stay motions recently filed (on July 28 and August 9, 1995) in the court of appeals, or in the pending remedial proceedings in the district court. If there were a true jurisdictional impediment to further proceedings in this case, bringing it to the attention of the lower courts could obviate any need for review by this Court.

[10] Petitioners also concede that Faulkner had standing, but any issue with respect to her standing is now moot in view of her withdrawal from The Citadel.

[11] In none of the cases upon which petitioners rely (Pet. 18-21) was such an injury shown.

Petitioners seek to turn respondents' objection to petitioners' choice of remedy into a jurisdictional defect, and thereby to avoid any obligation to remedy an established equal protection violation. Having found that petitioners violated women's right to equal protection of the laws (Faulkner App. 2a), the court of appeals gave petitioners the opportunity to propose a remedy that "conforms with the Equal Protection Clause." *Id.* at 18a. The court identified three remedies that, in its view, would do so: The Citadel could (1) establish parallel single-sex programs for men and women that are "substantively comparable"; (2) adopt a coeducation policy at The Citadel; or (3) withdraw state support for The Citadel and permit the college to continue as a private institution. *Id.* at 14a. On remand in the district court, petitioners chose the first option. Although the United States believes that no new, separate program could be equal to The Citadel and that the court of appeals thus erred in giving petitioners that remedial option, the court operated on the premise that petitioners could create an all-female school that would provide for women what The Citadel provides for men. The fact that the program is not the remedy that respondents sought does not deprive the court of jurisdiction to remedy the constitutional violation. See *Heckler* v. *Mathews*, 465 U.S. 728, 739-740 & n.8 (1984).[12] Indeed, it is a

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[12] The male plaintiff in *Mathews* sought spousal benefits under the Social Security Act on equal terms with women who obtained such benefits, and the Court held that he had standing even though the only available relief was to terminate the disputed benefits to women rather than extend them to men. 465 U.S. at 737. The Court recognized that, under the Equal Protection Clause, the fact that plaintiffs' situation may be equalized either by granting them the benefits enjoyed by the

familiar principle that judicial remedies are to be devised in light of both parties' contentions and the record in the case. See, *e.g.*, 28 U.S.C. 2106 (authorizing appellate courts to direct on remand "the entry of such appropriate judgment, decree, or order * * * as may be just under the circumstances").

In any event, even if petitioners were correct that the lower courts somehow lacked jurisdiction to hold that petitioners might remedy the constitutional violation by establishing a college for women that is "substantively comparable" to The Citadel, that defect would not absolve petitioners of responsibility to remedy the violation, but would simply remove that remedial option. Specifically, petitioners do not—and certainly cannot—contend that the lower courts lack jurisdiction to require coeducation at The Citadel, and the court of appeals has held that coeducation is an acceptable remedy. If the Court were to accept petitioners' "jurisdictional" argument, the consequence of that acceptance would be that petitioners were required to institute coeducation at The Citadel —precisely the result that petitioners seek to avoid.

2. Petitioners also assert (Pet 22-29) that this Court should review whether the absence of demand for an all-female Citadel-type educational program "constitutes a complete defense to any claim that the absence of such a program in South Carolina violates the Equal Protection Clause." Pet. 26. That issue is not worthy of review by this Court because the argument is completely fact-based, and petitioners

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preferred class (as they request) *or* by withdrawing those benefits from everyone (a remedy that plaintiffs ordinarily do not request)—or by equalizing the treatment of the two classes in some other way—does not affect plaintiffs' standing to litigate.

failed to prove any factual ground for it. Moreover, it is well established that, as a matter of law, the State's obligation to provide constitutionally equal educational opportunity for each woman who seeks it is not conditioned on how many other women seek the same opportunity.

Petitioners argued in the district court and the court of appeals that "single-sex educational opportunities are not available to women in South Carolina's public system of higher education because there is insufficient demand for them." Faulkner App. 6a (quoting district court, see *id.* at 54a). Both lower courts rejected that argument. The district court found that "no survey has been conducted to determine * * * how many women would be interested in pursuing a public single-sex education" and that "[t]he interest of South Carolina women in attending a Mary Baldwin-type program [such as that approved in *VMI II*] is unknown." *Id.* at 46a. Similarly, the court of appeals held that petitioners simply "failed to present evidence supporting an absence of demand." *Id.* at 8a. Indeed, petitioners conceded at oral argument in the court of appeals that "there really is no data before this court to support a finding of an absence of demand among women at the present time for single-gender education *of any type*." *Id.* at 9a (emphasis added). Thus, petitioners' demand argument is utterly lacking in factual foundation, *id.* at 8a-9a, and thus clearly does not warrant review by this Court.[13]

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[13] Petitioners lack-of-demand argument is further undermined by the fact that 22 women are participating in the all-female South Carolina Institute of Leadership for Women (SCIL) under review in the district court. Petitioners suggest

Even if absence of demand had been demonstrated, however, it could not justify the denial of any individual woman's entitlement to a remedy for the violation of her right to equal protection. Women cannot be excluded from a program that they wish to attend and for which they qualify, and be relegated instead to a substantially different program that they do not want and that does not meet their needs, solely because most women would not be inconvenienced by that result. At a time when racial segregation was constitutionally permissible under this Court's decisions, the Court held that a black person could not be denied admission to a white law school on the ground that not enough blacks were interested in a legal education to justify the establishment of a black law school as well. *Missouri. ex rel. Gaines* v. *Canada*, 305 U.S. 337 (1938). The equal protection right of the black law school applicant was "a personal one,"[14]

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that demand for such a program is irrelevant because "the inquiry relating to demand * * * is defined and delimited by the equal protection claim advanced by [respondents] in this case," Pet. 22, and respondents have never sought as a remedy the establishment of a SCIL-type program. Petitioners thus contend that "the only demand inquiry that may be relevant * * * is demand for an all-female military program that mirrors The Citadel in its mission, its goals, and its educational philosophies and methodologies." *Ibid.* As noted above, however, the court of appeals found no lack of demand for single-sex education "of any type." Faulkner App. 9a.

[14] See also *Adarand Constructors, Inc.* v. *Pena*, 115 S. Ct. 2097, 2112-2113 (1995); *J.E.B.* v. *Alabama*, 114 S. Ct. 1419, 1423-1434 (1994) (Kennedy, J., concurring in the judgment); *Regents of Univ. of California* v. *Bakke*, 438 U.S. 265, 289 (1978) (opinion of Powell, J.).

To be sure, additional considerations may be brought to bear in devising remedies for discrimination. "The unhappy

such that he was entitled to be furnished an educational program equal to that provided to whites "whether or not other negroes sought the same opportunity." *Id.* at 351. And as early as 1914 the Court held that the failure to offer black travelers luxury railroad accommodations that whites enjoyed could not be justified on the ground that too few black travelers could afford such accommodations. The rights of black travelers who could afford the accommodation were equal to those of whites who could afford them. *McCabe* v. *Atchison T. & S.F. Ry.*, 235 U.S. 151. The Equal Protection Clause affords women at least the level of individual protection against sex discrimination as *Gaines* and *McCabe* held was due to blacks under a regime of officially sanctioned racial segregation.[15]

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persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Adarand Constructors, Inc.*, 115 S. Ct. at 2117. The same may be said of remedies for discrimination based on sex, but petitioners do not contend, nor could they, that The Citadel's males-only admissions policy is remedial.

[15] Petitioners seek to distinguish *Gaines* and *McCabe* on the ground that those cases dealt with discrimination on the basis of race, not sex, and "[s]eparation of the races does not confer any benefit," while "[s]eparation of the sexes in single-gender education * * * has been proven to be pedagogically beneficial." Pet. 27. Those cases, however, were decided at a time, before *Brown* v. *Board of Education*, 347 U.S. 483 (1954), when the law reflected a belief that separation of the races *was* beneficial and constitutional. Oddly, petitioners seek to further distinguish those precedents on the ground that, because they were decided before *Brown*, they are "justly discredited," Pet.

3. The petition is also premature. Both questions that petitioners have presented relate to only one of the various remedial options the court of appeals suggested could remedy the violation in this case, and petitioners' implementation of that option has not yet been reviewed or approved by the lower courts.[16] On July 24, 1995, the district court set an October 15, 1995, cut-off date for discovery regarding the Converse College remedial proposal and ordered that a trial on remedy begin on November 6, 1995. It remains uncertain whether the district court or the court of appeals will find petitioners' separate program to be constitutionally adequate even under the lenient standard the court of appeals announced in *VII*. If petitioners' preferred remedy does not pass muster, petitioners, who do not otherwise challenge the court of appeals' liability decision, will have to adopt an alternative remedy, such as a sex-neutral admissions policy at The Citadel. Adoption of that remedy would obviate any need to address the ques-

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27, but the discredit those cases suffer is that they provided too little in the way of remedy, not that they provided too much.

[16] Although petitioners contend that lack of demand for single-sex education for women could be a complete defense to liability, *e.g.*, Pet. 26, they have never even asserted that there is any absence of demand among women for a coeducational Citadel. If only men desire single-sex education, and the type of education offered them cannot otherwise be made available to women, women must be admitted to the men's school. A desire to preserve The Citadel as a single-sex college for men cannot outweigh women's right to equal educational opportunity. *Hogan*, 458 U.S. at 731 n.17.

tions petitioners seek to raise here. Review of those questions therefore would be premature at this time.[17]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

DEVAL L. PATRICK
Assistant Attorney General

JESSICA DUNSAY SILVER
THOMAS E. CHANDLER
Attorneys

SEPTEMBER 1995

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[17] Petitioners suggest (Pet. 12) that the issues they now raise are worthy of review because Faulkner in this case and the United States in *VMI* have filed petitions for writs of certiorari. We believe that the question raised in Faulkner's petition is unripe because the lower courts have not yet reviewed and approved a remedy. See Memorandum for the United States in Opposition (No. 95-31). The *VMI* case is in a different posture. The lower courts have already reviewed the VWIL program at Mary Baldwin College and held that it is an adequate and constitutional remedy. With remedial proceedings in the lower courts completed, there is no lack of ripeness in that case. Because the judgment approving VWIL squarely conflicts with this Court's basic equal protection precedents, it calls for review—as we explain in our petition in that case (No. 94-1941).